IN THE

Supreme Court of the United States

October Term, 1951

No. 543

ON LEE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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The Government's brief in opposition contains many misstatements of fact and misinterpretations of the law which petitioner believes should not be permitted to go unchallenged. They will be discussed in chronological order as they appear in the Government's brief.

At footnote 8 appearing at page 10* an attempt is made to describe to the Court the manner in which Chin Poy, the special government employee, carried concealed upon his person a radio transmitter and the method used to operate it. This is totally unsupported by the record and must of necessity consist of guess work on the part of the

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* References are to pages of Government's brief unless otherwise designated.

writers of the Government's brief, for the record reference referred to in the brief is the description given by Agent Gim of the particular radio transmitter carried and used by him.

It is highly significant that in the present state of the record, due to the failure of the Government to produce or call as a witness Chin Poy, there is absolutely no proof that Chin Poy ever turned on any switch so that his radio transmitter would work.

At page 11 the brief again attempts to do what the Government did in its original brief in opposition to the petition for certiorari in that it relates that Agent Lee testified to an admission supposedly made by petitioner, subsequent to arrest, to Chin Poy on April 2, 1950 on the sidewalk in front of 35 Mott Street.

As is also pointed out in petitioner's main brief a close reading of the record discloses that the conversation allegedly held on April 2nd on the sidewalk did not in any manner refer to the transaction of January 22, 1950 (34). A further reading of the record at page 185 discloses that Agent Lee admitted upon cross examination that his entire direct testimony, concerning conversations allegedly held between Chin Poy and the petitioner, referred only to the conversation of March 30, 1950 which was one of the conversations held in petitioner's combined home and place of business.

In their Summary of Argument and throughout their brief the Government claims "that there was no entry by the use of fraud, stealth or duress". This contention first appears at page 12 of the brief and is repeated frequently thereafter. How the Government can hope to support this contention is not apparent since the record discloses that

the very nature of the equipment used by Chin Poy and Agent Lee, the short wave radio transmitter and receiver, depended for its success upon the entry of Chin Poy upon said premises in the guise of a friend, and without disclosure of the fact that he had concealed upon his person the radio transmitter in question. If this were not an "entry by the use of fraud and stealth" then the writer cannot conceive of any situation which would constitute such an entry. In *Gouled* v. *The United States*, 255 U. S. 298, this court held that where a soldier, friendly with the defendant Gouled, in fact a former employee just as Chin Poy was of the petitioner, called upon Gouled in the guise of a friendly visit but really with the intent and for the purpose of obtaining evidence, if possible; his entry into the office of the defendant in that case was accomplished by stealth and fraud and consisted of a surreptitious entry thus constituting an entry by trespass upon the premises of the defendant in question. All of the cases decided by this Honorable Court have held this to be repugnant to the safeguards granted by the Fourth Amendment.

In part II of the Government's Summary of Argument and again in Point II in the argument contained in the Government's brief an attempt is made to confuse the issue involved by repeatedly referring to and describing the radio transmitter used in the instant case as a "mechanical listening device" and ignoring the fact that the instruments were actually a mobile radio transmitting set and a radio receiving set. These are described at length under the various sections of Title 47, U. S. C. This will be discussed at greater length herein in replying to Point II of Government's argument.

Reply to Argument

Both in its brief in opposition to the original petition and in its present brief the Government has raised the contention that petitioner did not object in the court below to the introduction into evidence of the testimony now claimed to have been obtained in violation of the Fourth and Fifth Amendments. For reasons best known to the Government's counsel they have seen fit in both briefs to ignore the fact that at page 104 of the record there is noted a general objection to this evidence made by counsel for the petitioner in the trial court.

While it is true petitioner made no preliminary motions to suppress the evidence in question the reason for same is obvious. The evidence having been obtained surreptitiously by fraud and stealth petitioner could not be expected to have any knowledge of its existence until it was actually offered at the trial. The various cases cited by the Government in footnote 9 of its brief concerned themselves with factual situations where the defendant in question in each instance had more than ample notice prior to trial of the illegal search and seizure. As for example in the case of *United States* v. *Rabinowitz,* 339 U. S. 56, 63 we find the defendant, a stamp dealer arrested under a legal warrant and coupled with a debatable search (although it was believed by this court to be a legal one), conducted in his presence.

In *Segurola* v. *U. S.,* 275 U. S. 106, the possibly objectionable evidence was offered and received into evidence without any objection whatsoever being made on the part of the defendant on trial nor was there any denial of the testimony of the Government's witnesses by the defendants on trial. In the instant case we have a complete denial by petitioner.

In *United States* v. *Di Re*, 332 U. S. 581 this Honorable Court in its consideration of the question of illegal arrest and subsequent search and seizure proceeded to discuss among its members a section of the Penal Law of the State of New York which had not been urged in either the court below or even before the Supreme Court.

The Government totally ignores the case of *Gouled* v. *The United States, supra,* which held that the objection is not made too late if made upon notice of the existence of the evidence in question.

In *United States* v. *Rabinowitz*, 339 U. S. 56, Mr. Justice Black of this Court in his concurring opinion advances the theory that the Federal Exclusionary rule is not commanded by the Fourth Amendment but is a judicially created rule of evidence. He stated at page 66:

> "Trupiano v. United States, 334 U. S. 699, was decided on the unarticulated premise that the Fourth Amendment of itself barred the point of Evidence Obtained by what the Court considered an 'unreasonable' search. I dissented in that case. Later concurring in Wolf v. Colorado, 338 U. S. 25, 39-40, I stated my agreement with the 'plain implication' of the Wolf opinion that the Federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. In the light of the Wolf case, the Trupiano rule is not a Constitutional command, but rather an evidentiary policy adopted by this court in the exercise of its supervisory powers over federal courts. Cf. McNabb v. United States, 318 U. S. 332."

At page 16 counsel for the Government states that in the instant case "there was no searching". Nothing could

be further from the truth for here we are presented with a picture of a person in the employ of the Government, engaging petitioner in lengthy and involved conversation. According to the testimony of Agent Lee, the conversation between Chin Poy and the petitioner began with small talk and gossip of New York's Chinatown and was gradually and pointedly led around to the incident of January 22, 1950. Apparently counsel for the Government has never heard of or read the terms of description frequently applied to the manner of eliciting the testimony of witnesses appearing in court proceedings and the present popular Congressional hearings, namely: "under a searching questioning" or "under a searching cross-examination". The most concise and literate minds in existence in this Country today, that is the reporters and rewrite men employed by the various newspaper publications throughout these United States could find no more descriptive term than the word "searching". The Government contends at page 17 that the word "search connotes uncovering that which is hidden, prying into hidden places for that which is concealed". What can be considered as more hidden or concealed than the thoughts of a human being?

At page 17 the Government attempts to liken the radio transmitter used here to the detectaphone used in *Goldman* v. *United States*, 316 U. S. 129. The difference between the two instruments is very marked in that the detectaphone or induction coil merely amplifies sounds which might have been detected by one with extremely keen hearing whereas the short wave radio does not amplify but actually transmits and propels upon the ether waves the matter received by the microphone attached to the transmitter. This distinction will be discussed at greater length later herein.

The case of *Hester* v. *United States*, 265 U. S. 57, is not in point, since in that case there was no actual entry into the building in question but merely a trespass upon the land of the defendant.

In *Johnson* v. *The United States*, 333 U. S. 10, cited in the Government's brief, this Honorable Court held that where officers were legally in a public hallway of a hotel and smelled the fumes of burning opium they were not justified in trespassing upon the premises of the room from which these fumes emanated.

At page 19 it is argued by the Government that if Chin Poy had taken pictures of petitioner with a concealed camera that would be admissible. The only trouble with this argument is that it does not follow through to a logical conclusion since if the pictures taken had been of petitioner's private papers they unquestionably would have been rejected as being obtained in violation of the Fourth Amendment. The Government's argument also states that "that would be as legitimate as his testimony telling what he saw" but fails to take into consideration that in the instant case *Chin Poy never appeared or testified.*

Running throughout the argument of the Government is the false premise that Chin Poy's entrance into the premises of petitioner was not a trespass and repeatedly we find the statement that entrance was not obtained by fraud or stealth. It is respectfully submitted that the record amply demonstrates without further argument the fallacy of this contention of the Government nor does the Government's contention gain weight by its constant repetition.

At page 24 of the Government's brief we find the argument that this Honorable Court does not condemn legal means of obtaining evidence because same might also have

been obtained by illegal methods. The contrary is also true and this Court has repeatedly refused to condone the obtaining of evidence by illegal methods because it might also have been possible to have obtained same by legal methods. This disposes of the argument offered at page 25 of the brief namely: the same results might have been obtained by Agent Lee standing on the street in front of petitioner's premises or by his posing as a customer in the laundry. It likewise disposes of the argument as to what Chin Poy might have been permitted to testify to, particularly since he was never called as a witness nor any explanation or excuse offered for his non-appearance in any court.

Replying to Point II of the Government's argument it is respectfully submitted that the Government throughout its argument offered under this point ignores the purpose and mechanical makeup of the instrument used here, the radio transmitter and radio receiver set. At page 29 they attempt to describe the radio in question as "merely a mechanical means of eavesdropping".

Under Section 153 of title 47, U. S. C. we find among others the following definitions:

> "(b) 'Radio Communication' or 'Communication by Radio' means the transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus and services (among other things the receipt, forwarding and delivery of communications) incidental to such transmission."
>
> "(k) 'Radio Stations' or 'Station' means a station equipped to engage in radio communication or radio transmission of energy."

"(l) 'Mobile Station' means a radio communication station capable of being moved and which ordinarily does move."

If the Government's contention was correct then there could not be any prosecution for violation of the various sections of title 47 U. S. C. where private individuals used mobile or portable radio transmitters and receiving sets, particularly if they are careful not to make any statement which might be construed as an effort to broadcast and merely conduct an imaginary conversation which would be picked up and transmitted by the microphone and transmitter concealed upon their person. There have been many successful prosecutions of persons operating from race tracks with microphones and transmitters of the type and nature used here and by means of which they are able to broadcast to confederates outside the track having receiving sets similar to the one used by Agent Lee, the running and the results of the races viewed by them. If the Government's contention made in the instant case were proper then the law could easily be circumvented by the person carrying the transmitter stationing himself near one of the loud speakers located at the race track from which emanates a description of the running of the race, so long as the party in question refrained from speaking to the party receiving the result of the broadcast.

Likewise unscrupulous people using the same type of transmitter and receiver have been successful in mulcting unwitting bookmakers when the confederate with the transmitter instead of being stationed at a race track was stationed near a telephone line or radio from which the results were obtained for re-broadcasting to the party, with the receiving set, waiting in the immediate vicinity of the place of operation of the bookmaker. In prosecutions for

violations of this type no distinction has been made nor could be made between the broadcasts by the party with the transmitter of what he has heard on the telephone or radio or the re-broadcast by him of what was being said over the radio or telephone.

At page 30 it is contended by the Government that a broadcast of a conversation does not consist of a communication by radio within the meaning of the Communication Act. Apparently the counsel for this Government is ignorant of or chooses to ignore the many instances when commercial broadcasters over standard wave lengths immediately preceding or following the scheduled broadcast, have made personal remarks believing themselves to be "off the air" and not realizing that they were talking into or before a "live" microphone. These remarks usually have been of a derogatory or improper nature and whenever this has occurred it has resulted in action being taken by the Federal Communication Commission against the individual and the Radio Station involved and quite often has resulted in the imposition of monetary fines by the Federal Communication Commission.

The Government's brief totally ignores the fact that not only was this an interception of a radio broadcast but that also Agent Lee's testimony resulted in the divulging and publishing of the contents of a radio communication. Too, it results in a person not entitled thereto, since the petitioner had never given his consent to broadcast to Agent Lee, receiving a message by radio and using the same for his own benefit. Both of these things as well as the interception complained of are within the interdiction of section 605 of title 47 U. S. C.

In *Nardone* v. *United States*, 302 U. S. 379 it was held that the phrase "no person" embraces Federal Agents

engaged in the detection of crime and that the phrase "to divulge" includes testimony in Court.

In conclusion it is respectfully submitted that if, as contended by the Government at page 33, the radio instrument used here was not a protected channel of communication any more than a detectaphone or hearing aid there would have been no rhyme or reason for setting forth a description of this type of instrument in section 153 of title 47 U. S. C. as set forth at length *supra*.

In reply to Point III of the Government's brief in opposition it is respectfully submitted that the Government fails to answer in any manner the fact that, as pointed out at pages 50 and 51 of petitioner's brief that when the court stated "if before the arrest" the trial court twice in its charge gave to the Jury for its consideration a state of facts that did not exist. When we consider the proposition presented here we must come to the inevitable conclusion that if a defendant after arrest is to be held to have acquiesced in an accusatory statement made by a co-defendant in his presence by reason of his failure to deny same we destroy completely the constitutional guaranty contained within the Fifth Amendment against compelling anyone in a criminal prosecution to be a witness against himself. For this Honorable Court to rule as urged by the Government would mean that every defendant must testify against himself prior to trial by making a statement in answer to an accusation of this type made by a co-defendant or by the repetition, whether true or false, of such an accusation by an officer of the law to a defendant.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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